Supreme Court, U.S.
FILED
DEC 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-905

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1986

PHILADELPHIA ELECTRIC COMPANY,

Petitioner

v.

BLACK GRIEVANCE COMMITTEE, et al.,

Respondents

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

HERBERT B. NEWBERG, ESQ.
ALICE W. BALLARD, ESQ.
JEAN R. STERNLIGHT, ESQ.
PHILIP S. FUOCO, ESQ.
Attorneys for Respondents

Lippincott Bldg.
Suite 200
227 South 6th Street
Philadelphia, PA 19107
Tel: (215) 922-4740

QUESTIONS PRESENTED

1. Where a district court has, in the exercise of its discretion, determined that plaintiffs presented adequate evidence of complexity, contingency, novelty and risk to support a 50% contingency enhancer, and where the Court of Appeals has affirmed the district court's exercise of its discretion, should the Supreme Court take certiorari to assess whether the district court abused its discretion?

2. Should the Supreme Court grant a writ of certiorari in each and every case which raises the question of whether a fee award may ever be enhanced to reflect the contingent aspect of the case pending this Court's resolution of related issues in Commonwealth of Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air?

3. Where, in the exercise of its discretion, the district court found it appropriate to apply a Hensley reducer of 25% and where the Court of Appeals affirmed the district court in such exercise of its discretion, should the Supreme Court grant a writ of certiorari to assess whether the Hensley reducer was correctly determined?

TABLE OF CONTENTS

	Page
Questions Presented	(i)
Table of Contents	(iii)
Table of Authorities	(iv)
Statement of the Case	1
Reasons for Denying the Writ:	
I. THE THIRD CIRCUIT'S AFFIRMANCE OF THE SUFFICIENCY OF THE RECORD TO SUPPORT THE DISTRICT COURT'S DISCRETIONARY DETERMINATION OF THE CONTINGENCY ENHANCER DID NOT CONFLICT WITH THIS COURT'S DECISION IN BLUM v. STENSON	4
II. THE COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE MERELY BECAUSE THIS CASE, LIKE MANY CASES AROUND THE COUNTRY, CONTAINS A RULING REGARDING A "CONTINGENCY" FACTOR	6
III. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION TO APPLY A HENSLEY REDUCER OF 25% DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN HENSLEY v. ECKERHART ..	9
Conclusion	11
Certificate of Service	12

TABLE OF AUTHORITIES

CASES: Page

Black Grievance Committee v. PECo, 615 F. Supp. 1069 (E.D. Pa. 1985) 2

Blum v. Stenson, 465 U.S. 886 (1984) 4

Cf. City of Riverside v. Rivera, 106 S. Ct. 2686 (1986) 10

Commonwealth of Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, October Term, 1985, No. 85-5 .... (i), 6, 7

Hensley v. Eckerhart, 802 F.2d at 654 .. passim

Illinois Welfare Rights Organization v. Miller, 723 F.2d 564 (7th Cir. 1983) 10

STATEMENT OF THE CASE

This fee litigation arises out of a race discrimination claim filed more than ten years ago, in 1975, by black employees and applicants for employment at the Philadelphia Electric Company ("PECo"). Following substantial discovery, regarding plaintiffs' company-wide claims, and following extensive preparation for trial, a settlement providing for both monetary and injunctive relief was finally reached on the verge of trial in July, 1983. Notice of the settlement was given to the class and the court ultimately approved the settlement in the form of a consent decree signed January 3, 1985.

The Black Grievance Committee ("BGC") filed a fee petition with the district court. Subsequently, on August 13, 1985 the district court ordered PECo to pay plaintiffs' counsel

fees and costs totalling $475,938.18. Black Grievance Committee v. PECo, 615 F. Supp. 1069 (E.D. Pa. 1985).

Upon receipt of the district court's ruling, defendants chose to appeal on a variety of issues. While agreeing to pay to plaintiffs' counsel a little over $100,000 in fees and costs, defendant refused to pay the remainder of the fees, pending appeal. Faced with defendant's appeal, plaintiffs cross-appealed various aspects of the district court's decision to the Court of Appeals.

The Court of Appeals on September 22, 1986, affirmed the district court on certain grounds, found for plaintiffs on certain grounds, found for defendant on certain grounds, and remanded the matter to the district court for further rulings. (802 F.2d 648 (3rd Cir. 1986)). Before the district court had an opportunity to rule on remand, defendant filed the instant

petition for writ of certiorari, challenging the district court's exercise of its discretion in calculating the contingency multiplier and the Hensley reducer.

Plaintiffs oppose the grant of a writ of certiorari in this matter and urge that the writ be denied expeditiously. As set forth below, defendant has failed to demonstrate that any aspect of the Appellant Court's decision warrants the grant of a writ of certiorari. See Sup. Ct. R. 17.

Reasons for Denying the Writ

I. THE THIRD CIRCUIT'S AFFIRMANCE OF THE SUFFICIENCY OF THE RECORD TO SUPPORT THE DISTRICT COURT'S DISCRETIONARY DETERMINATION OF THE CONTINGENCY ENHANCER DID NOT CONFLICT WITH THIS COURT'S DECISION IN BLUM v. STENSON

Just as it argued to the district court and to the Court of Appeals, PECo once again asserts that plaintiffs' counsel failed to present evidence to support a contingency enhancer. Characterizing plaintiffs' counsels' extensive affidavits as mere rhetoric, defendant claims the record was therefore "operatively" equivalent to the totally blank record in Blum v. Stenson, 465 U.S. 886 (1984). (See Petition at 6).

Defendant's argument fails. As the Court of Appeals found, plaintiffs, in counsels' affidavits, specifically identified the legal

and factual complexities of the case. (A36-A38). The arguments set forth by defendant focus on the sufficiency of the record in support of the district court's assessment of the amount of the contingency multiplier. This is a purely discretionary decision addressing the record in this particular case. This exercise of discretion was reviewed and affirmed on appeal.

The district court's discretionary determination that plaintiffs were entitled to a specific contingency multiplier, well within the range of similar awards in countless other fee precedents, certainly does not establish a conflict with this Court's decision in Blum or present an issue of national importance, such that this Court should grant a writ of certiorari pursuant to Rule 17.1(c).

II. THE COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE MERELY BECAUSE THIS CASE, LIKE MANY CASES AROUND THE COUNTRY, CONTAINS A RULING REGARDING A "CONTINGENCY" FACTOR

Defendant argues that because this Court has heard re-argument, in Pennsylvania v. Delaware Valley Citizens Counsel for Clean Air, October Term, 1985, No. 85-5, on "the question whether attorney's fees chargeable to a losing defendant under the Clean Water Act and the comparable statute may be enhanced based on the risk of loss," 52 USLW 5017, 5023 (1986), that this Court should necessarily grant certiorari in the instant case as well, in order "to permit a correct application of the law of contingency enhancers ..." (Petition at page 7).

Defendant's argument proves too much. Were this Court to grant certiorari in each case pending in the Third Circuit or around

the country which raised an issue already being considered by the Court, the Court's docket would quickly become overwhelmed with such cases. Moreover, decisions in cases throughout the country would be substantially delayed pending the outcome in various Supreme Court matters.

Nor is it necessary for the Court to grant certiorari in such cases in order to promote uniformity or consistency. Any decision the Supreme Court reaches in Delaware Valley will, of course, become the law of the land with respect to contingency. The hypothetical new ruling regarding contingency will apply to any case filed after the issuance of such ruling and, if the court chooses to make the ruling retroactive, it will also affect pending cases filed prior to the decision's date. However, just as the issuance of a new ruling will not require a court to re-examine cases decided prior to the decision's issuance,

so too there is no need to take certiorari on all pending cases which raise an issue the Supreme Court may possibly address. Uniformity and consistency are best achieved not by taking certiorari on all such pending cases but, rather, by ensuring that all new decisions are properly applied once they have been issued.

III. THE THIRD CIRCUIT'S AFFIRMANCE OF THE DISTRICT COURT'S EXERCISE OF ITS DISCRETION TO APPLY A HENSLEY REDUCER OF 25% DOES NOT CONFLICT WITH THE SUPREME COURT'S DECISION IN HENSLEY v. ECKERHART

Defendant's second attempt to reverse the district court's Hensley computation on the grounds that it was not based on an "objective" calculation of plaintiffs' degree of success also fails to warrant grant of a writ of certiorari. As the Court of Appeals found, 802 F.2d at 654 (A35-A36), the district court's computation of the Hensley factor fell well within the discretionary zone defined by Hensley. The district court's calculation quite legitimately took into account the overall value to the class of such affirmative action measures as hiring goals, creation of an affirmative action committee, provision of training classes, provision of a career counseling program, and development of a sensitivity training

program for supervisors. (A35-A36; A18-A21). Cf. City of Riverside v. Rivera, 106 S. Ct. 2686 (1986) (vindication of important civil and constitutional rights may be included in assessment of plaintiffs' success). Particularly given the fact that plaintiffs obtained their success in the instant case through settlement, rather than through litigation, it cannot be said that the district court abused its discretion in calculating the Hensley success factor. Illinois Welfare Rights Organization v. Miller, 723 F.2d 564 (7th Cir. 1983). More important, certainly the district court made no misapplication of Hensley which would warrant a grant of certiorari in this matter.

CONCLUSION

Defendant has failed to set forth any consideration warranting grant of a writ of certiorari. The writ should be denied. Defendant has established neither that the Third Circuit's calculation of the contingency or Hensley factors presents an important question of federal law which conflicts with this Court's decisions, nor that this Court must grant certiorari to resolve any conflicts among the Circuits. See Sup. Ct. R. 17.1. Accordingly, plaintiffs respectfully request that this Court deny the writ expeditiously and permit plaintiffs to collect the fees to which they are entitled after more than ten years of litigation.

HERBERT B. NEWBERG, ESQ.
ALICE W. BALLARD, ESQ.
JEAN R. STERNLIGHT, ESQ.
PHILIP S. FUOCO, ESQ.

Lippincott Bldg. Suite 200
227 South 6th Street
Philadelphia, PA 19107

CERTIFICATE OF SERVICE

I hereby certify that three copies of this Opposition to Petition for a Writ of Certiorari were served by Hand Delivery upon:

Robert W. Maris, Esquire
2600 The Fidelity Building
Philadelphia, PA 19109-1094
Attorney for Petitioner

HERBERT B. NEWBERG, ESQUIRE
ALICE W. BALLARD, ESQUIRE
JEAN R. STERNLIGHT, ESQUIRE
PHILIP S. FUOCO, ESQUIRE
Attorneys for Respondents

Lippincott Building
Suite 200
227 South 6th Street
Philadelphia, PA 19106
Tel: (215) 922-4740

Dated: December 15, 1986